No. 86-217

Supreme Court, U.S.
FILED
AUG 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

In Re the Matter of
PATTON L. SMITH, LAURENCE J. BERRY,
JACK R. CHANDLER, JOSEPH A. SIGFRID,
DON F. ELLER, DAN E. SUTHER,
RICHARD ROMINGER AND HANS VAN NES,
Petitioners.

Ninth Cir. No. 85-2313;
D.C. No. CVF 84 55 EDP
(E.D. Cal.)

PETITIONERS' PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED FOR REVIEW

The question for which Petitioners are seeking mandamus is, whether a motions panel of the Ninth Circuit Court of Appeals, in contravention of the mandate of this Court in *Mitchell v. Forsyth* (1985) ____ U.S. ____ [105 S.Ct. 2806], without hearing, erroneously denied Petitioners' right to an appeal of an adverse ruling on their entitlement to "qualified immunity" as public officials.

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Ninth Cir. No. 85-2313;
D.C. No. CVF 84 55 EDP
(E.D. Cal.)

PETITIONERS' PETITION FOR WRIT OF MANDAMUS

To the Honorable William H. Rehnquist, Circuit Justice for the Ninth Circuit Court of Appeals:

Defendants/Appellants/Petitioners herein, Patton L. Smith, Laurence J. Berry, Jack R. Chandler, Joseph A. Sigfrid, Don F. Eller, Dan E. Suther, Richard Rominger and Hans Van Nes; (hereinafter collectively referred to as "Petitioners"), hereby petition this honorable Court for a writ of mandamus directed to the Ninth Circuit Court of Appeals and the judges thereof to hear and consider Petitioners' appeal of the district court's August 23, 1983 order denying Petitioners' summary judgment, insofar as it ruled federal law against which Petitioners' conduct was to be measured, was "clearly established." By this Petition it is alleged as follows:

I

STATEMENT OF CASE

2. This issue was drawn into focus by the following events:

a. On September 27, 1979, Respondents, George and Hendrika Neary, sued California Department of Food & Agriculture employees, Patton L. Smith, Laurence J. Berry, Jack R. Chandler, Joseph A. Sigfrid, Don F. Eller, Dan E. Suther, Richard Rominger and Hans Van Nes, who are the Petitioners herein. (United States District Court's Memorandum and Order of August 23, 1983, page 2: lines 1-14, which is attached as Appendix "A"; hereinafter Mem. & Order page: line).

b. The district court's order from which Petitioners appealed described the facts pertinent to its ruling as follows. Petitioners were sued for allegedly violating Respondents' civil rights and other due process transgressions, arising out of their involvement in the State of California's effort to control and eradicate "scabies" in cattle and other livestock. (Mem. & Order 2: 1-22) Parenthetically, that effort is part of a cooperative state and federal program to achieve that goal (*ibid.*). Scabies is described as an infestation of mites that may be passed directly from an infected animal to a clean animal, or, may be passed indirectly to a clean animal that comes into contact with contaminated objects where hair from an infected animal may have been deposited, *e.g.*, fences or loading shoots (*ibid*). In approximately July, 1978, Respondents purchased a herd of pregnant cattle from Tulana Farms, located near Klamath Falls, Oregon. Respondents apparently intended to put these cattle on their ranch in Chico, California, for a brief period of time, then transfer them to a winter range. Calving was anticipated to begin sometime around late January of 1979. (Mem. & Order 2: 2-27) In November, 1978, some of the individual Petitioners allegedly determined that the cattle obtained by Respondents from Tulana Farms had been exposed to scabies infested cattle while in Oregon. (Mem. & Order 3: 1-3) Before Respondents' cattle could be transferred to the winter range, some of the individual Petitioners determined that this cattle must be chemically treated for scabies. (Mem. &

Order 3:3-6) A "hold order" was issued preventing Respondents' cattle from being transported (Mem. & Order 6: 7).

c. Petitioners filed a Motion for Summary Judgment (F.R.Civ.P. 56) for numerous reasons, including the grounds they were entitled to "qualified immunity" as established by this Court in *Harlow v. Fitzgerald* (1982) 457 U.S. 800 [102 S.Ct. 2727].

d. On August 23, 1983, the district court issued its Memorandum and Order which in pertinent part denied Petitioners' Motion for Summary Judgment, which had been brought on the grounds of "qualified immunity."

e. On September 16, 1983, Petitioners filed a Notice of Appeal with Ninth Circuit Court of Appeals seeking review of the district court's determination that Petitioners are not entitled to qualified immunity for their conduct (Appendix "B").

f. On January 6, 1984, a motions panel for the court of appeals, consisting of circuit judges Choy, Hug, Ferguson, in response to Respondents' "Emergency Motion" dismissed Petitioners' appeal (Appendix "C").

g. On June 19, 1985, this Court announced its decision in *Mitchell v. Forsyth, supra.*

h. On July 16, 1985, as soon as *Mitchell v. Forsyth, supra,* was final, Petitioners again filed a Notice of Appeal seeking review of the district courts' order of August 23, 1983, insofar as it determined the law, against which Petitioners' conduct was to be measured, was "clearly established" at the time of Petitioners' conduct (Appendix "D").

i. On August 14, 1985, Respondents again sought the dismissal of Petitioners' appeal, which the Ninth Circuit, through the motions panel made up of circuit judges Choy, Hug and Ferguson, ruled, without providing Petitioners the opportunity to brief or argue the substance of their appeal, on February 12, 1986 as follows:

> "Appellees' motion for relief to file a reply to appellants' opposition to the motion to dismiss is granted. Appellants' request for leave to file a further response is denied.

> Because the notice of appeal was untimely, see Fed.R.App.P. 4(a)(1) we construe it as a motion to reinstate No. 83-2409, a timely appeal from the district court's order of August 23, 1983. Construed as such, the motion is denied. The appeal does not turn upon an issue of law. *See Mitchell v. Forsyth,* 105 S.Ct. 2806, 2817 (1985).
>
> The appeal is dismissed for lack of jurisdiction. (Appendix "E").

j. On February 25, 1986, Petitioners sought rehearing of the motions panel's decision, and that was denied by circuit judges, Choy, Hug and Ferguson, on June 23, 1986 (Appendix "F").

k. With this procedural background, it is abundantly clear, Petitioners seek only the right to have the merits of the district court's August 23, 1983 order reviewed.

II

PARTIES TO THE PROCEEDING

3. Petitioners, Patton L. Smith, Laurence J. Berry, Jack R. Chandler, Joseph A. Sigfrid, Don F. Eller, Dan E. Suther, Richard Rominger and Hans Van Nes, are the defendants in district court case No. CVF 85 55 EDP, which is pending in the Eastern District of California. Petitioners are also the appellants in the Ninth Circuit Court of Appeals wherein they have sought review of the district court's order of August 23, 1983 on two occasions, *i.e.* Ninth Circuit No. 83-2409 and 85-2313.

4. Respondents, George and Hendrika Neary, individually and George Neary as representative for Neary And Neary Partnership, and Neary And Neary Partnership aka Neary Enterprises and Neary Ranches, a Partnership, are the plaintiffs in district court case No. CVF 84 55 EDP, wherein they have sued Petitioners and others for damages they have allegedly sustained. Respondents are also appellees in the two above-mentioned Ninth Circuit appeals.

5. Burroughs Wellcome Company was also sued by Respondents in district court case No. CVF 84 55 EDP, because

Burroughs Wellcome manufactured the pesticide which Petitioners used to treat Respondents' cattle.

6. Vernon Reitan, veterinarian for the United States Department of Agriculture, was also sued by Respondents in district court case No. CVF 84 55 EDP; however, he is no longer a party to this litigation because the district court granted his motion for summary judgment.

III
ARGUMENT

A. Mandamus Is the Appropriate Device for Compelling the Ninth Circuit Court of Appeals to Hear Petitioners' Appeal

7. With the limited resources available to this Court, it is well recognized,

> "[t]he issuance by the Court of any extraordinary writ authorized by 28 U.S.C. Section 1651(a) it is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will aid in the court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers and that adequate relief cannot be had in another form or from any other court."

(U.S. Sup. Ct. Rule 26).

8. Noting the authority vested in this Court by 28 U.S.C. Section 1651(a)[1] it is further recognized, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." (*Kerr v. United States District Court for N.Dist. of Cal.* (1976) 426 U.S. 394 [48 L.Ed.2d 725; 96 S.Ct. 2119]). And, "the writ 'has traditionally been used in the federal courts

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[1] Section 1651 of Title 28 provides in pertinent part as follows:
"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in the aid of their respective jurisdictions and agreeable to the usages and principles of law. . . ."

only to confine an inferior court to a lawful exercise of its prescribed jurisdiction *or to compel it to exercise its authority when it has a duty to do so.*' " (*Id.* at 426 U.S. 402 [96 S.Ct. 2123], quoting *Will v. United States* (1967) 389 U.S. 90, 95 [19 L.Ed.2d 305; 88 S.Ct. 269]; emphasis added)

9. The various conditions under which a writ may lie are:

(1) The party seeking the writ has no adequate means to attain the relief desired; (see *Roche v. Evaporated Milk Ass'n* (1943) 319 U.S. 21 [87 L.Ed. 1185; 63 S.Ct. 939]; and

(2) The right to issuance of the writ is clear and indisputable (see *Bankers Life & Cas. Co. v. Holland* (1953) 346 U.S. 379 (93 L.Ed. 106; 74 S.Ct. at 148]).

10. In *Sacramento Bee v. United States District Court* (1981 9th Cir.) 656 F.2d 477; *cert. denied* 456 U.S. 983 [72 L.Ed.2d 861; 102 S.Ct. 2257]) the Ninth Circuit recognized the following criteria, "all of which need not be present" in order to issue a writ of mandamus.

(1) The party seeking the writ has no other adequate means, such as a direct appeal to attain the relief he or she desires.

(2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.)

(3) The district court's order is clearly erroneous as a matter of law.

(4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.

(5) The district court's order raises new and important problems, or raises issues of first impression.

(See also *Levine v. U.S. D.Ct. for Cent'l Dist. Calif.* (1985 9th.Cir.) 764 F.2d 590).

B. This Court's Intervention is Necessary to Compel the Ninth Circuit Court of Appeals to Follow the Recent Teachings of this Court in *Mitchell v. Forsyth, supra,* and *Davis v. Scherer* (1984) ____ U.S. ____ [82 L.Ed.2d 139; 104 S.Ct. 3012]

11. At bench, a review of the facts present in light of these criteria demonstrates a compelling need for this Court's intervention.

12. First, Petitioners have no other adequate means, such as a direct appeal, to obtain the relief desired. Succinctly, Petitioners are only seeking the substantive review by the Ninth Circuit Court of Appeals of the district court's denial of their motion for summary judgment. The Ninth Circuit refuses to exercise its authority when it has a duty to do so. Ironically, it appears as if the motions panel of the Ninth Circuit Court of Appeals on two occasions, in dismissing Petitioners' appeal for "lack of jurisdiction" has determined the merits of Petitioners' appeal, without ever providing Petitioners an opportunity to brief the merits of this appeal. Both appeals were dismissed by the motions panel in response to Respondents' motions to dismiss, which were brought prior to any substantive briefing on the merits. This Court is the only forum available to Petitioners to compel the Ninth Circuit to hear Petitioner's appeal.

13. Second, remedies available to Petitioners through trial or subsequent appeal are inadequate as a matter of law. (see *Mitchell v. Forsyth, supra.*) Subjecting Petitioners to trial without first obtaining appellate review of the denial of "qualified immunity" is precisely the detriment this Court was trying to avoid when it provided public officials, claiming "qualified immunity" with immediate appellate review. (ibid)

14. Third, the Ninth Circuit Court of Appeals order dismissing Petitioners' appeal and denying Petitioners a rehearing is clearly erroneous as a matter of law.[2] The Ninth Circuit Court of Appeals has jurisdiction under the auspices of this Court's opinion in *Mitchell v. Forsyth, supra,* to review the district court's

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[2] On June 23, 1986, circuit judges Choy, Hug and Ferguson denied Petitioners; Petition for Rehearing.

denial of Petitioners' motion for summary judgment. This motion for summary judgment was brought in pertinent part on the grounds Petitioners are entitled to "qualified immunity" because the law against which Petitioners' conduct is measured, was not "clearly established" at the time Petitioners acted.

15. The motions panel of the circuit court has ruled, without ever having the issue briefed and argued, that Petitioners' appeal does not turn on an issue of law. Furthermore, the circuit court ruled without any indication as to the basis for its ruling. The dismissal of Petitioners' appeal is in apparent disregard of the teachings of this Court in *Mitchell v. Forsyth, supra,* and *Davis v. Scherer, supra,* ____ U.S. ____ [82 L.Ed.2d 139; 104 S.Ct. 3012]. In *Mitchell v. Forsyth* this Court allowed review of a trial court's denial of summary judgment which was brought on the basis of "qualified immunity" to the extent that it turns on an issue of law. In describing the question of qualified immunity is conceptually distinct from the merits of a plaintiff's claim that his rights have been violated, this Court noted:

> "An appellate court reviewing the denial of defendant's claim of immunity need not consider the correctness of plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a *question of law.* Whether the legal norms allegedly violated by the defendant were clearly established at the time of the changed actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.[9] To be sure, the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief. . . . " fn. 9 "We emphasize at this point that the appealable issue is purely a legal one: whether the facts alleged [by the plaintiff, or, in some cases the defendant, support a claim of violation of clearly established law]." (*Mitchell v. Forsyth, supra,* 105 S.Ct. at 2816, 2817; emphasis added).

16. In applying the collateral order doctrine to the issue of qualified immunity this Court noted that the question of immunity is separate from consideration of the merits of the underlying action even though the reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue. (*Id.* at 105 S.Ct. 2817).

17. At bench, the district court found that factual issues existed on the claimed *violation* of rights but ruled, the legal standard of conduct to which defendants were required to conform was clear. (Mem. & Order 18: 13-16). Petitioners appealed from that ruling only.

18. It is clear, notwithstanding even a conceded violation of rights presently enforceable under Section 1983, a public official exercising discretionary authority is immune from liability if the right or the minimum requirements for its protection were not clearly established at the time of the conduct at issue. (*Harlow v. Fitzgerald, supra, Davis v. Scherer, supra.*

19. A brief review of the bases for Respondents' claims against Petitioners demonstrates the Petitioners' right to have the district court's order denying summary judgment reviewed prior to trial. Respondents contend in pertinent part that they are entitled to collect damages from Petitioners because of Petitioners' alleged violation of FIFRA (Federal Insecticide Fungicide and Rodentcide Act), procedural due process, substantive due process and the Fourth Amendment to the United States Constitution. Petitioners contend they are entitled to qualified immunity, even assuming Respondents' factual allegations are correct.

a. Petitioners Are Entitled to Qualified Immunity for Alleged Violations of FIFRA

20. Respondents allege that Petitioners violated rights secured by federal law enforceable under Section 1983 by violating FIFRA. The district court ruled that Respondents could maintain such a claim on the basis of a Supreme Court decision subsequent to the conduct in question which held that violations of federal statutes may in certain circumstances be remedied by an action under Section 1983 (Mem. & Order 8-9).

21. On the qualified immunity issue the district court ruled that the immunity was not available because FIFRA required at the time of the conduct in question that registered pesticides not be used in a manner inconsistent with labeling (id. at 18).

22. The district court did not address the determinative issue whether at the time of the conduct in question an individual had a clearly established right under Section 1983 to remedy a violation of FIFRA. Absent clearly established law that the violation of a statute gives rise to an action *under Section 1983,* a violation of the statute cannot be a violation of clearly established rights protected by that section. A violation of a statute which does not create a right under Section 1983 does not defeat qualified immunity from liability under that section. (*Davis v. Scherer, supra,* 82 L.Ed.2d at 149,note 12).

23. The conduct in question occurred in December of 1978. Not until 1980 was it clearly established in *Maine v. Thiboutot* 448 U.S. 1, that violation of a federal statute might give rise to a cause of action under Section 1983. The Court has also ruled, whether a specific federal statute would be enforceable under Section 1983 would depend on a determination whether the statute was the kind that created enforceable rights under Section 1983, and whether Congress had foreclosed private enforcement of that statute in the enactment itself. (*Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n* (1981) 453 U.S. 15, 19).

24. The Ninth Circuit, itself ruled in 1983 that a question still remained "whether FIFRA secures . . . any 'rights' subject to protection under Section 1983."(*Oregon Environment Council v. Kunzman* (9th Cir. 1983) 714 F.2d 901, 904).

25. It is clear the Petitioners could not have violated "clearly established rights" under Section 1983 by an alleged violation of FIFRA in 1978 when those rights are not yet established. A review of the district court's ruling on that facet of the qualified issue involves only a question of law.

b. Petitioners are Entitled to Qualified Immunity for Alleged Violation of Procedural Due Process

26. Respondents contend that Petitioners violated their rights to procedural due process by failing to provide a hearing prior to issuance of the hold order, treatment of the cattle, and maintenance of the hold order on the untreated cattle. (Mem. & Order 9:7-10). On the question of the merits of the claimed violation, the district court ruled that a question of fact existed under the Rule of *Parratt v. Taylor* (1981) 451 U.S. 527, whether it was practicable to hold some type of prior hearing.[3] It also ruled that the determinations by Petitioners as agricultural experts were not sufficiently neutral to constitute due process apart from a hearing. (Mem. & Order p. 10:20-11:8).

27. *Parratt* and its progeny have established that a violation of procedural due process rights enforceable under Section 1983 in an action seeking damages in federal court occurs only where there is no adequate post-deprivation remedy provided by law.[4] To establish a *violation* of rights enforceable in a Section 1983

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[3] At the time of its ruling the district court did not have the benefit of this Court's decision in *Hudson v. Palmer* (1984) ____ U.S. ____ 104 S.Ct. 3194, in which this Court made clear that a prior hearing is impracticable as a matter of law when the alleged wrongful conduct is random, unauthorized conduct by a state employee rather than a result of established state procedure.

[4] Where the claimed violation of procedural due process is a result of *established state procedure* rather than random, unauthorized conduct, the existence of post-deprivation remedies does not satisfy due process. *Logan v. Zimmerman Brush Company* (1981) 455 U.S. 422. Where the public official acts in accordance with established state procedure in denying constitutional procedural rights, however, an action in federal court based on such violation is limited to one for prospective relief, not for damages as sought by Respondents herein. (*Edelman v. Jordan* (1974) 415 U.S. 651; *Penhurst State Schools & Hospital v. Halderman* (1985) ____ U.S. ____ [104 S.Ct. 900, 909]).Therefore, the only action against a state official for a procedural due process violation for which damages can be sought in federal court is one resulting from alleged random, unauthorized conduct. If Petitioners' conduct were to be in accordance with established state procedure rather than unautho-

action for damages in these circumstances requires a showing that due process was not given before the deprivation and that no adequate post-deprivation remedy existed. To establish that there was no *qualified immunity* for liability for such violation requires a showing that the lack of inadequate post-deprivation remedy was clearly established at the time of the conduct in question. Thus, in this case the question of qualified immunity for liability for the alleged violation of procedural due process turns on the question whether it was clearly established at the time of the conduct that the post-deprivation remedies available to Petitioners were inadequate. This is solely a question of law.

c. Petitioners are Entitled to Qualified Immunity for Alleged Violation of Substantive Due Process

28. Respondents allege Petitioners violated their rights to substantive due process in that the decision requiring quarantine and treatment and the conduct of the treatment were arbitrary and unreasonable. (Mem. & Order 9: 12-18). On the question whether a violation was sufficiently shown to maintain the action, the district court held that no substantive due process violation occurred from the conduct of the treatment (Mem. & Order 14: 8-15: 14), but that there had not been a sufficient showing of the available professionally acceptable choices to determine whether the decision which required quarantine and treatment constituted a violation of substantive due process. (Mem. & Order 13: 9-14: 7). On the qualified immunity question with respect to the claimed violation of substantive due process, the district court stated, "[o]utrageous government conduct was and is considered to be a violation of due process." (Mem. & Order 18: 26-27). The court did not address the qualified immunity issue whether an allegedly erroneous decision that the cattle were exposed to scabies, requiring quarantine and treatment under California law, was conduct which was clearly established at that time to constitute a violation of rights of substantive due process.

29. The issue for purposes of the qualified immunity question is not whether the professional decision was so unfounded as to be

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rized conduct as alleged by Respondents, the action for damages in federal court would be barred by the Eleventh Amendment.

arbitrary and unreasonable, but whether the law was clearly established at the time that such a determination would constitute conduct so outrageous and shocking to the conscience as to be a denial of substantive due process. Petitioners submit this is solely a question of law.

d. Petitioners Are Entitled to Qualified Immunity for Alleged Violation of Fourth Amendment Rights

30. Respondents allege that the placement of the hold order on the cattle restricting movement of the cattle constituted an unreasonable "seizure" in violation of the Fourth Amendment as incorporated in the Fourteenth Amendment. (Mem. & Order 15: 15-27). As to the merits of the violation allegations, the district court found that there were facts in dispute as to the reasonableness of the decisions to impose and maintain the hold order. (Mem. & Order 16: 18-28). On the *qualified immunity* issue, the district court ruled, "[t]he Fourth Amendment has never conferred broad authority upon government officials to conduct warrantless searches and seizures." (Mem. & Order 18: 28-19:2).

31. Under California law existing at the time, if cattle were found to be exposed to scabies, the law provided that they were placed under hold order and treated. (See Calif. Food & Agric. Code §§ 9565, 9302, 9303). The issue for purposes of a qualified immunity question is whether at the time of the determinations in question the law was *clearly established* that an allegedly erroneous decision would constitute an unreasonable seizure in violation of the Fourth and Fourteenth Amendments. (See *e.g. Davis v .Scherer, supra,* 82 L.Ed.2d 148, Note 10). As this Court noted in *Davis,* "[t]he qualified immunity doctrine recognizes that officials can act without fear of harassing litigation *only if they reasonably can anticipate when their conduct may give rise to liability for damages* and only if unjustified lawsuits are quickly terminated." (*Id.* at 82 L.Ed.2d 150; emphasis added).

32. Whether it was clearly established at the time that such an allegedly erroneous judgment would consitute a violation of constitutional rights to be free form unreasonable seizure is solely a question of law.

CONCLUSION

The court of appeals has failed to follow this Court's holding in *Mitchell v. Forsyth* by erroneously interpreting the district court's order on qualified immunity to turn on a question of fact rather than law. Petitioners respectfully submit the court of appeals misconstrued and misapplied *Mitchell v. Forsyth* and denied Petitioners the appellate review to which this Court has declared they are entitled. A review of the district court's order denying Petitioners qualified immunity clearly shows that the only issue for review is whether the rights claimed to have been violated were "clearly established" at the time of the alleged conduct in question. This is solely a question of law and should have been heard and resolved by the court of appeals.

WHEREFORE, Petitioners pray that a writ of mandamus be immediately issued under seal of this Court directing the Ninth Circuit Court of Appeals to hear Petitioners' appeal from the district court's order of August 23, 1983 denying Petitioners summary judgment on the grounds of "qualified immunity."

ALTERNATIVELY, Petitioners pray that an order to show cause be issued directed to Respondent and Real Party in interest to show cause why the writ of mandamus prayed for herein should not be issued.

Dated: July 23, 1986

Respectfully submitted,

KAHN, SOARES & CONWAY

BY: LEONARD HERR
Attorneys for Petitioners

Appendix A

In the United States District Court
for the Eastern District of California

Civil No. S-79-673-PCW

George and Hendrika Neary,
Plaintiffs,

v.

Patton L. Smith, et al.
Defendants.

[Filed Aug. 23, 1983]

MEMORANDUM & ORDER

On November 24, 1982, counsel for the parties in this action appeared before the court, the Honorable Philip C. Wilkins, presiding. Oral arguments were presented on the state defendants' motion for partial summary judgment, the federal defendant's motion for entry of judgment, and the plaintiffs' motion to reconsider the court's order of September 16, 1982. The matters were taken under submission at the close of the hearing. By letter dated May 6, 1983, plaintiffs' counsel requested the court to consider several additional case authorities in ruling on the submitted motions. No response to said letter or objection from opposing counsel has been filed.

I. BACKGROUND

This action was commenced on September 27, 1979. Plaintiffs are George and Hendrika Neary. The named defendants are Patton L. Smith, Dan E. Suther, Laurence J. Berry, Joseph A. Sigfrid, Jack R. Chandler, Don F. Eller, Richard Rominger, Hans Van Nes, Vernon N. Reitan, and Burroughs Wellcome Company. For purposes of this action, defendants Smith, Suther, Berry, Sigfrid, Chandler and Eller are employees of the Bureau of Animal Health, California Department of Food and Agriculture;

defendants Rominger and Van Nes are the director and deputy director, respectively, of the California Department of Food and Agriculture; defendant Reitan is an employee of the United States Department of Agriculture; and defendant Burroughs Wellcome Company is a manufacturer of chemical pesticides.

The individual defendants are involved in California's effort to control and eradicate "scabies" in cattle and other livestock. The effort is part of a cooperative state and federal program to achieve that goal. Scabies is described as an infestation of mites that may be passed directly from an infected animal to a clean animal, or, may be passed indirectly to a clean animal that comes into contact with contaminated objects where hair from an infected animal may have been deposited, e.g., fences or loading chutes.

In approximately July 1978, plaintiffs purchased a herd of pregnant cattle from Tulana Farms, located near Klamath Falls, Oregon. Plaintiffs apparently intended to put these cattle on their ranch in Chico, California, for a brief period of time, and then transfer them to a winter range. Calving was anticipated to begin sometime around late January 1979.

In November 1978, some of the individual defendants allegedly determined that the cattle obtained by plaintiffs from Tulana Farms had been exposed to scabies infested cattle while in Oregon. Before plaintiffs' cattle could be transferred to the winter range, some of the individual defendants determined that those cattle must be chemically treated for scabies. A "hold order" was issued preventing plaintiffs' cattle from being transported.

During the latter half of December 1978, some of the individual defendants commenced treating plaintiffs' cattle while on plaintiffs' ranch. The treatment operation involved "spray-dipping" the cattle with a solution of pesticide known as "toxaphene." The pesticide was manufactured and marketed by defendant Burroughs Wellcome under the tradename "Cooper-Tox Livestock." Prior to the treatment of all of plaintiffs' cattle, however, the operation was halted when at least one of the cattle began exhibiting symptoms associated with pesticide poisoning. Plaintiffs' cattle were placed under observation. The operation to

treat plaintiffs' cattle was never restarted. The hold order, at least in part, was maintained in effect until approximately July 1979.

Plaintiffs were permitted to file an amended complaint in this action on February 2, 1981. The amended complaint alleges four separate claims for relief, only the first of which is relevant to the pending motions. Plaintiffs allege that the individual defendants' actions caused the death of approximately 600 pregnant cattle and/or new-born calves, depressed the value of plaintiffs' ranch and remaining herd, required the expenditure of $250,000 to treat sick cattle, impaired plaintiffs' credit rating, and, inflicted severe emotional distress upon George Neary. Plaintiffs allege that their federal constitutional and statutory rights were violated by the individual defendants. The claim is brought as a civil rights action under 42 U.S.C. section 1983, with jurisdiction based on 28 U.S.C. sections 1331 (federal question) and 1343 (civil rights). Compensatory and exemplary damages exceeding $11 million are sought under this claim.

II. PLAINTIFFS' MOTION TO RECONSIDER

Plaintiffs raise three grounds for reconsideration of the court's order of September 16, 1982, granting defendant Reitan's motion for summary judgment. First, plaintiffs argue that the court erred in applying the Supreme Court's decision in *Parratt v. Taylor*, 101 S.Ct. 1908 (1981), to plaintiffs' substantive due process theory of relief. Second, plaintiffs maintain that the additional evidence submitted in opposition to the state defendants' motion for partial summary judgment reveals triable issues of fact as to whether defendant Reitan participated with the state defendants in one or more conspiracies to violate plaintiffs' civil rights. Finally, plaintiffs contend that defendant Reitan may still be liable under 42 U.S.C. section 1983 for violation of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. section 136 *et seq.* [hereinafter FIFRA].

The first ground for reconsideration suggested by the plaintiffs is not without controversy. The court is aware of several court decisions and scholarly commentaries on the *Parratt* case which support plaintiffs' position. *See, e.g., Duncan v. Poythress*, 657

F.2d 691, 704-705 (5th Cir. 1981), *cert. dism'd as having been improvidently granted*, 103 S.Ct. 368 (1982); *Peters v. Township of Hopewell*, 534 F.Supp. 1324 (D.N.J. 1982); Note, 23 B.C.L.Rev. 1219, 1248-1254 (1982); Note, 56 Tul.L.Rev. 1441, 1450-1454 (1982). *But see* discussion in *Homes v. Wampler*, 546 F.Supp. 500, 504-505 & n.4 (E.D.Va. 1982). The court is not persuaded, however, that its original reliance on *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981), *aff'd on other grounds sub nom. Kush v. Rutledge*, 103 S.Ct. 1483 (1983) and *Weiss v. Lehman*, 676 F.2d 1320, 1322 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 725 (1983), was misplaced. That the Ninth Circuit in *Rutledge* applied the *Parratt* rationale to a substantive due process claim is clear from the appellate court's characterization of the claim as one based upon the case of, *inter alia*, *Meredith v. State of Arizona*, 523 F.2d 484 (9th Cir. 1975). *See Rutledge, supra*, 660 F.2d at 1352. Even plaintiffs herein agree that *Meredith v. State of Arizona* was a substantive due process case. *See* Plaintiffs' Brief in Opposition to State Defendants' Motion for Partial Summary Judgment [hereinafter Plaintiffs' Opposition Brief] at 51. The court also has not been persuaded that the evidence before it permitted a conclusion other than that defendant Reitan at most, had engaged in a random, unauthorized departure from established procedures. The court therefore rejects the first basis for reconsideration offered by the plaintiffs and will now briefly address the remaining two grounds.

In deciding defendant Reitan's motion for summary judgment, the court found it to be unnecessary to decide whether FIFRA could be enforced under 42 U.S.C. section 1983. *See* Order of September 16, 1982 at 9:5-7. That conclusion followed from the court's determination that plaintiffs had not raised a genuine dispute of fact re defendant Reitan's participation in a conspiracy with the state defendants. Since plaintiffs' amended complaint had not alleged nor had their opposition brief suggested a possible basis other than conspiracy to meet Section 1983's "color of state law" requirement, *see* Plaintiffs' Brief in Opposition to Defendant Reitan's Motion for Summary Judgment at 23-29, it was unnec-

essary to reach that FIFRA issue.[1] Upon consideration of the instant motion, the court finds no basis to change its conclusion as to plaintiffs' conspiracy allegations against defendant Reitan. Therefore, it is again unnecessary to reach that FIFRA issue as to defendant Reitan.

Plaintiffs' motion to reconsider will be denied.

III. FEDERAL DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT

In light of the court's September 16, 1982 order granting his motion for summary judgment, defendant Reitan now seeks entry of judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Rule 54(b) provides in pertinent part that:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment . . .

In *Morrison-Knudsen Co., Inc. v. Archer,* 655 F.2d 962 (1981), the Ninth Circuit reversed a district court's entry of a Rule 54(b) judgment and commented upon the Rule as follows:

> Judgment under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties. The trial court should not direct entry of judgment under Rule 54(b) unless it has made specific findings setting forth the reasons for its order. Those findings should include a

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[1] There is no dispute that defendant Reitan's involvement with the state defendants was through a cooperative federal-state scabies eradication program established pursuant to 21 U.S.C. section 114a. Plaintiffs' amended complaint alleges only that defendant Reitan acted "under color of his authority as a federal employee." Amended Complaint, ¶ 31.

> determination whether upon review of the judgment entered under the rule, the appellate court will be required to address legal or factual issues that are similar to those contained in claims still pending before the trial court. A similarity of legal or factual issues will weigh heavily against entry of judgment under the rule, and in such cases a Rule 54(b) order will be proper only when necessary to avoid a harsh and unjust result, documented by further and specific findings.

655 F.2d at 965.

In his moving papers, defendant Reitan argues that there is no reason for delaying entry of judgment since he has been found to have a unique involvement in this action and the remaining litigation will be protracted. Entry of judgment at this juncture will allegedly save expenses both to defendant Reitan and to his counsel. If judgment is not entered, defendant Reitan maintains that his counsel will still have to attend depositions, etc., since plaintiffs intend to try to introduce evidence at trial relating to defendant Reitan's involvement. Defendant Reitan further argues that entry of judgment at this time will facilitate settlement and improve case management.

The court need not recite plaintiffs' response inasmuch as defendant Reitan's arguments are not sufficient to warrant entry of a Rule 54(b) judgment in this case. The similarity of legal issues between the plaintiffs' claim against defendant Reitan and against the state defendants is substantial. Although some of defendant Reitan's reasons for entry of judgment may be pursuasive in a given case, *see, e.g., Alcan Aluminum Corp. v. Carlsberg Financial Corp.*, 689 F.2d 815, 817 (9th Cir. 1982), they are not compelling here where most of the legal issues on appeal are likely to be identical. Under these circumstances, the court cannot conclude that entry of judgment is necessary to avoid a harsh and unjust result.

Defendant Reitan's motion for entry of judgment will be denied.

IV. STATE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

In the September 16, 1982 order, the court set forth the standards applicable on a motion for summary judgment. *See* Order of September 16, 1982 at 3:5-30. Those standards are, of course, also applicable to the state defendants' motion for partial summary judgment and are incorporated here by reference.[2]

A. Enforceability of FIFRA under Section 1983

The court previously concluded that there is no implied right of action for damages under FIFRA. While the court found no affirmative congressional intent to create a damage remedy, *see* Order of September 16, 1982 at 9:3-5, that conclusion does not compel a like result with respect to Section 1983. *See Middlesex County Sewerage Authority v. National Sea Clammers Association,* 101 S.Ct. 2615, 2625 (1981). Inasmuch as plaintiffs are not required to demonstrate Congress's intent to preserve a Section 1983 remedy for federal statutory violations, *see Middlesex, supra,* 101 S.Ct. at 2626 n.31 (majority opinion) and 101 S.Ct. at 2630 n.11 (Stevens, J., dissenting), there is a virtual presumption that plaintiffs may seek relief under Section 1983 for violations of federal statutes by persons acting under color of state law. *See Maine v. Thiboutot,* 100 S.Ct. 2502 (1980). After consideration of the parties' arguments in light of *Middlesex, supra,* and *Pennhurst State School & Hospital v. Halderman,* 101 S.Ct. 1531 (1981), the court cannot conclude that the state defendants have sufficiently demonstrated congressional intent to preclude a Section 1983 action based on alleged violations of FIFRA. Until that

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[2] The state defendants' reply brief in support of their motion for partial summary judgment was accompanied by a motion to strike certain portions of plaintiffs' opposition brief and materials. Upon consideration of the parties' arguments and upon examination of the subject documents, the court concludes that only the following matter should be stricken from Plaintiffs' opposition brief: "...; Suther stopped the sale having a hold order placed on the receiving ranch..." Plaintiffs' October 18, 1982 Opposition Brief at 43:14-15. The quoted portion will not be considered by the court. In all other respects, the state defendants' motion to strike will be denied.

is done, plaintiffs must be allowed to proceed with this theory of relief.

B. Due Process Violations

Plaintiffs allege that the decisions to impose the hold order on plaintiffs' cattle, to treat the cattle, and to maintain the hold order after the treatment operation was halted, were improperly made without a prior hearing. The absence of such a hearing is alleged to have violated plaintiffs' right to procedural due process. Plaintiffs also argue that the decisions themselves were arbitrary and unreasonable, and therefore violative of their right to substantive due process. Plaintiffs further contend that, in addition to the treatment decision, the conduct of the treatment operation was arbitrary and unreasonable. Thus, plaintiffs separately claim that the treatment operation itself violated substantive due process.

With respect to plaintiffs' procedural due process claim, the state defendants argue that a prior hearing was not required in order to enforce a public health law. They also argue that adequate post-deprivation remedies were available and, alternatively, that plaintiffs received all the process that was due. The court must reject these arguments under the circumstances of this case.

Although a state may take extreme measures to combat the spread of disease by animals known to be infected, *see, e.g., Affonso Bros. v. Brock*, 29 Cal.App.2d 26 (3d Dist. 1938), the threatened spread of disease and the state's interest is reduced once the quarantine is in place. There are questions of fact in the present action as to whether there was even any emergency requiring imposition of the hold order without some type of prior hearing. *See* August 25, 1981 Declaration of Laurence J. Berry at ¶¶ 4-6; July 9, 1982 Declaration of Billy R. Heron at ¶¶ 13-16; July 11, 1982 Declaration of Patton L. Smith at ¶ 3. Even if the state defendants demonstrate exigent circumstances requiring immediate imposition of a hold order prohibiting movement of plaintiffs' cattle, those circumstances do not a fortiori demonstrate the need to commence treatment of the cattle, nor does the initial emergency mandate continuation of the hold order for over six months. Plaintiffs have raised a factual issue of whether any

emergency conditions existed once the hold order was issued. *See* December 11, 1979 Deposition of Laurence J. Berry at 137:2-148:7.

Since issues of fact exist as to whether it was practical to hold some type of hearing prior to making the challenged decisions, the presence of post-deprivation remedies cannot defeat plaintiffs' procedural due process claim at this juncture. *Cf., Parratt v. Taylor supra.* Additionally, the court rejects the state defendants' argument that plaintiffs necessarily received all the process that was due. In support of this argument, the state defendants rely on the Supreme Court's decision in *Parnam v. J.R.*, 99 S.Ct. 2493 (1979). In *Parnam,* the Court held that the minor plaintiffs received adequate procedural protection when state psychiatrists investigated the medical jusitifications for parental decisions to voluntarily commit their children to a mental institution. The state psychiatrists were regarded as neutral factfinders whose intervention was necessary to reduce the risk of a parent's erroneous decision to deprive a child of his or her liberty. 99 S.Ct. at 2506. In the present case, however, the state defendants simply are not in a position comparable to the state psychiatrists in *Parnam*: they are not parties neutral to the decisions challenged by the plaintiffs herein. Thus, the court is not prepared to say that plaintiffs, as a matter of law, received all the process that was due. Summary judgment is therefore inappropriate as to plaintiffs' procedural due process claim.

With respect to plaintiffs' substantive due process theory, the court notes plaintiffs' dichotomy between the various decisions challenged by plaintiffs and the conduct of the treatment operation. *See, e.g.,* plaintiffs' Opposition Brief at 24:19-25:7. The court must also note, however, a distinction between those defendants who are alleged to have participated in the decision-making process and those who participated in the treatment operation. There is no dispute that only state defendants Berry, Sigfrid, Chandler, Eller and federal defendant Reitan actually went onto plaintiffs' ranch to treat plaintiffs' cattle. *Compare* State Defendants' Opening Brief at 10:6-12:17, *with* Plaintiffs' Opposition Brief at 46:4-48:14. The state defendants have also demonstrated an absence of any genuine dispute that only defendants Berry,

Suther and Smith may have been involved in the initial decision to issue the hold order and to treat the cattle. *See* Berry Declaration, *supra,* at ¶¶ 5, 20-21; August 17, 1982 Declaration of Dan E. Suther at ¶¶ 8, 13-14; Smith Declaration, *supra,* at ¶¶ 3-6; July 14, 1982 Declaration of Jack R. Chandler at ¶ 4A & B; July 7, 1982 Declaration of Joseph A. Sigfrid at ¶ 6A & B; August 11, 1982 Declaration of Donald F. Eller at ¶ 4A & B; July 19, 1982 Declaration of Richard Rominger at ¶ 2A & B; July 20, 1982 Declaration of Hans Van Nes at ¶ 2A & B. Likewise, defendants have shown that only defendants Suther and Smith were primarily involved in the decision to maintain the hold order. *See* Suther Declaration, *supra,* at ¶¶ 12, 17; Smith Declaration, *supra,* at ¶ 8; Berry Declaration, *supra,* at ¶ 24; Chandler Declaration, *supra,* at ¶ 4C; Sigrid Declaration, *supra,* at ¶ 6C; Eller Declaration, *supra,* at ¶ 4C. *See also,* July 6 & 7, 1981 Deposition of Wayne C. Merhoff at 22:17-24:15; August 4, 1981 Deposition of Patton L. Smith at 259:2-14. Plaintiffs have raised an issue of fact, however, as to whether defendants Van Nes and Rominger became actively or passively involved in the maintenance of the hold order. *See* June 8, 1981 Deposition of Floyd M. Marsh at 63:22-64:9, copy of excerpts filed as Exhibit 21 of Plaintiffs' Opposition to State Defendants' Motion for Partial Summary Judgment. *Compare* October 6, 1980 Declaration of George Neary at ¶¶ 8-10, *with* Rominger Declaration, *supra,* at ¶ 3 and Van Nes Declaration, *supra,* at ¶ 3. *See also,* June 19, 1980 Deposition of Hans Van Nes at 102:5-104:26. While this distinction between the defendants and their respective activities does not preclude application of vicarious liability theories, the distinction is necessary for analysis of plaintiffs' substantive due process claim.

Plaintiffs argue that the challenged decisions were "arbitrary and unreasonable" deprivations of their property interests. Plaintiffs have maintained that such conduct is prohibited by the due process provisions of the federal constitution, citing, for example, *Jacobson v. Tahoe Regional Planning Agency,* 566 F.2d 1353, 1359 (9th Cir. 1977), *aff'd in part and rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 99 S.Ct. 1171 (1979). Plaintiffs have also cited numerous additional cases where sufficiently egregious conduct of

state officials was held to violate due process. *See* Plaintiffs' Opposition Brief at 50:18-51:20, *citing, e.g., Meredith v. State of Arizona, supra.*

On the present motion, the state defendants argue that the disputed decisions constituted reasonable exercises of state police power. They contend that the decisions were valid under the standard applied by the Supreme Court in *Youngberg v. Romeo,* 102 S.Ct. 2452 (1982). Defendants argue that under *Youngberg,* a trained professional's decision is presumptively valid and liability may pe imposed only where the decision is "such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible did not base the decision on such a judgment." *Youngberg, supra,* 102 S.Ct. at 2462. It appears to this court, however, that the *Youngberg* test, if applicable at all, cannot be applied without first determining what is the accepted professional practice or standard in the particular field. The Court in *Youngberg* acknowledged that whether several professionally acceptable choices or only one was available to decisionmakers should be established by expert testimony. *See id.,* 102 S.Ct. at 2456 n.10 and 102 S.Ct. at 2462 n.31. None of the affidavits or exhibits submitted by the parties delineate the scope of professionally acceptable decisions that could have been made by the state defendants, nor would conflicting expert opinion normally be dispositive on a motion for summary judgment. *See, e.g., Sartor v. Arkansas Natural Gas Corp,* 64 S.Ct. 724, 729 (1944). Moreover, were this court to apply the *Youngberg* test, or some other standard articulated in substantive due process cases, *see, e.g., Holmes v. Wampler, supra,* 546 F.Supp. at 505 ("shocking to the conscience"), the facts are sufficiently in dispute as to require trial of this claim.

As previously noted, plaintiffs also allege that the treatment operation itself was conducted by defendants Berry, Chandler, Sigfrid and Eller in manner violative of due process. In their opposition brief, plaintiffs on one hand have characterized these defendants' position as one of having followed procedures. Consistent with their training. *See* Plaintiffs' Opposition Brief at 53:24-54:6. On the other hand, at the hearing on this motion, plaintiffs' counsel argued that defendants followed neither state

nor federal procedures for the use of toxaphene in the spray-dip treatment of cattle for scabies. In either event, however it is inconceivable that defendants could have paused to conduct some type of hearing before each step taken during the treatment process. Thus, it simply was not practical to provide any meaningful type of "hearing" during the course of the treatment operation itself. Under the Ninth Circuit's analysis in *Rutledge v. Arizona Board of Regents, supra,* plaintiffs' substantive due process rights were not violated if adequate post-deprivation remedies were available.

The state defendants have suggested that adequate relief is available under numerous state procedures, including an action for damages under the California Tort Claims Act, Government Code section 810 *et seq. See* State Defendants' Reply Brief at 47:13-17. Plaintiffs have not disputed the adequacy of this remedy for deprivation of property interests. Indeed, the Fourth Claim for Relief in plaintiffs' amended complaint seeks over $1 million in damages through this state law remedy. *See* Amended Complaint, ¶¶ 55-58. Much as the Supreme Court in *Parratt v. Taylor* found a similar state tort claims procedure to be sufficient for due process purposes, this court finds the California procedure to be an adequate post-deprivation remedy for the injuries allegedly resulting from conduct of the treatment operation. Having reached that conclusion the court further concludes that defendants Berry, Sigfrid, Chandler and Eller are entitled to summary judgment on plaintiffs' substantive due process theory re the treatment operation. *See Rutledge v. Arizona Board of Regents, supra.*

C. Unreasonable Seizure of Plaintiffs' Cattle

In addition to FIFRA and due process violations, plaintiffs allege that defendants engaged in a warrantless "seizure" of plaintiffs' property without probable cause in violation of the Fourth Amendment. That provision of the Bill of Rights is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See, e.g., Mapp v. Ohio,* 81 S.Ct. 1984, 1689-1691 (1961). Plaintiffs' theory is that placement of the hold order barring movement of the cattle "deprived plaintiffs of their control of the herd." *See* Plaintiffs' Opposition Brief, Exhibit 3 at

14:11-13; Plaintiffs' Opposition Brief at 9:8-10. Taking control of plaintiffs' cattle through the imposition of the hold order is the alleged basis for plaintiffs' Fourth Amendment claim. *See id.* at 14 n.8; Plaintiffs' Opposition Brief at 9 n.5.

The court has already found no dispute of fact that only defendants Berry, Suther and Smith were involved in the initial imposition of the hold order barring movement of plaintiffs' cattle and in the decision to treat the herd. *See* discussion at 11:21-12:3, *supra.* Defendant's Suther and Smith also were involved in the decision to maintain that order. *See* discussion at 12:3-11, *supra.* Defendants Van Nes and Rominger also may have become peripherally involved in the decision to maintain the hold order. *See* discussion at 12:11-20, *supra.* Since defendants Sigfrid, Chandler, Eller and Reitan participated only in the treatment operation, *see* discussion at 11:17-21, *supra,* at the direction of defendant Berry, the court finds that the conduct of defendants Sigfrid, Chandler, Eller and Reitan was not and could not have been the proximate cause of the alleged Fourth Amendment violation. *See Arnold v. International Business Machines Corp.,* 637 F.2d 1350, 1356-58 (9th Cir. 1981). To that extent, summary judgment in favor of these latter defendants is appropriate.[3]

As this theory of relief applies to the remaining state defendants, however, the court must refer to its order dated December 4, 1980. In denying defendants' prior motion for summary judgment, this court found, *inter alia,* a dispute of fact re "Whether the defendants had probable cause to place a hold order upon and demand treatment of plaintiffs' cattle." Order of December 4, 1980 at 2:5-6. Since the court has already noted the existence of factual disputes as to the reasonableness of the decisions to

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[3] In the September 16, 1982 order, the court applied the rationale of *Parratt v. Taylor, supra,* to plaintiffs' Fourth Amendment claim as well as plaintiffs' due process theories of relief. *See* Order of September 16, 1982 at n.6. Plaintiffs' motion to reconsider did not dispute that portion of the court's order. As indicated by the court's discussion herein, however, defendant Reitan would be entitled to summary judgment on the additional ground that his conduct could not have been the proximate cause of the alleged Fourth Amendment violation.

impose and maintain the hold order for due process purposes, the same state of the evidence precludes summary judgment on the question of probable cause.

D. Equitable Estoppel

To the extent plaintiffs' claims are based on the treatment of their cattle, the state defendants alternatively argue that plaintiffs consented to such treatment and should be estopped to deny that consent. In its ruling on defendants' prior motion for summary judgment, the court found numerous disputes of fact precluding entry of summary judgment on this issue. *See* Order of December 4, 1980 at 2:7-23. The evidence submitted on the present motion likewise reveals disputed issues of fact material to the estoppel defense. For example, there is a dispute as to what George Neary was told by defendant Suther re the state accepting responsibility for consequences of the treatment operation, and what George Neary was told by defendant Smith. *Compare* December 6, 1979 Deposition of Patton L. Smith at 107:4-108:19, *with* October 15, 1982 Declaration of George Neary at pp. 893:22-896:1 and 916:26-917:15 of deposition excerpts attached thereto. Whether or not George Neary was misled by the defendants is, of course, highly relevant to a determination of the voluntariness of his consent. More importantly, the evidence proffered by these defendants does not define the scope of any consent that was allegedly given. These disputed factual issues alone preclude summary judgment on the claim of estoppel.

E. Qualified Immunity

Relying on the Supreme Court's decision in *Harlow v. Fitzgerald,* 102 S.Ct. 2727 (1982), the state defendants also contend that they are entitled to the defense ofr qualified immunity for the statutory and constitutional violations alleged by the plaintiffs. In *Harlow,* the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 102 S.Ct. at 2738. The qualified immunity given to the federal officials in *Harlow* is also available

to state officials sued under Section 1983. *See, e.g., Nakao v. Rushen,* 545 F.Supp. 1091, 1092 (N.D.Cal. 1982). *See also, Harlow, supra,* 102 S.Ct. at 2738-2739 n.30. Moreover, the Court in *Harlow* found resolution of the qualified immunity defense on summary judgment to be appropriate by determining whether the laws allegedly violated were clearly established at the time of the challenged conduct. *Id.* at 2739.

Applying the *Harlow* analysis to the state defendants, the court finds that the rights asserted by plaintiffs were based on laws clearly established at the time of defendants alleged misconduct. FIFRA required then, as it does now, that registered pesticides not be used in a manner inconsistent with its labeling. 7 U.S.C. § 136j(a)(2)(G). Deprivation of property without a prior opportunity to be heard has long been recognized as the antithesis of traditional due process requirements. *See Fuentes v. Shevin,* 92 S.Ct. 1983, 1998 (1972). Even where emergency action by the state has been sanctioned, the requirement of a hearing soon after an initial deprivation, *see, e.g., Mitchell v. W.T. Grant Corp.,* 94 S.Ct. 1895, 1901-05 (1974), or while the deprivation is continuing, *cf., O'Connor v. Donaldson,* 95 S.Ct. 2486, 2493-94 & n.11 (1975), is well-established. Outrageous government conduct was and is considered to be a violation of due process. *See, e.g., Holmes v. Wampler, supra; Peters v. Township of Hopewell, supra.* The Fourth Amendment has never conferred broad authority upon government officials to conduct warrantless searches and seizures. *See, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 91 S.Ct. 1999 (1971). While a determination that these statutory and constitutional strictures were violated necessarily depends on the facts of each case, doubts as to whether particular conduct rises to the level of a violation does not render the legal standard unclear. Accordingly, the court cannot hold at this time, that the state defendants are qualifiedly immune from damage liability as a matter of law.[4]

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[4] This conclusion does not necessarily preclude assertion of the qualified immunity defense at trial. In *Harlow,* the Court observed:

> If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. *nevertheless, if the official*

F. Direct and Vicarious Liability

In view of the foregoing determinations, a lengthy discussion of the remaining issues is not required. There is no dispute that the state defendants' alleged actions were done under color of state law for purposes of plaintiffs' Section 1983 claim. *See* State Defendants' Opening Brief at 75:6-11; State Defendants' Reply Brief at 60 n.38. As such, trial of plaintiffs' civil rights claim will proceed against each state defendant under at least some of plaintiffs' theories of statutory and constitutional violation. During the trial, evidence as to each defendant's participation in the events underlying this action will be presented to the fullest extent permitted irrespective of any particular theory of imposing direct or vicarious liability. Whether sufficient evidence has been offered to send to the jury the issue of civil conspiracy may be determined at the close of plaintiffs' case-in-chief or at some other appropriate time thereafter. Under these circumstances, the court concludes that determination of these issues on summary judgment is inappropriate and unnecessary.

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pleading the defense claims extraordinary circumstances and can prove that he neither knew not should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

102 S.Ct. at 2739 (emphasis added). Of course, the official asserting the defense must still demonstrate that he or she was engaged in discretionary functions rather than the performance of ministerial tasks. *Id.* at 2738.

V. CONCLUSION

In light of the foregoing discussion of the parties respective motions,

IT IS HEREBY ORDERED that plaintiffs' motion to reconsider be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that defendant Reitan's motion for entry of judgment be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that the state defendants' motion for partial summary judgment be, and the same hereby is:

1. GRANTED in favor of defendants Berry, Chandler, Sigfrid and Eller re plaintiffs' substantive due process claim based on these defendants' alleged conduct during the treatment operation. *See* discussion at 14:8-15:14, *supra*.

2. GRANTED in favor of defendants Chandler, Sigfrid and Eller re plaintiffs' Fourth Amendment claim based on the issuance and maintenance of the hold order. *See* discussion at 16:1-17, *supra*.

3. DENIED in all other respects.

DATED: August 23, 1983

/s/ PHILIP C. WILKINS
United States District Judge

Appendix B

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United States District Court
for the
Eastern District of California

No. Civil S-79-673-PCW

George and Hendrika Neary,
Plaintiffs,

vs.

Patton L. Smith, et al.,
Defendants.

[Filed Sept. 16, 1983]

Notice of Appeal

NOTICE IS HEREBY GIVEN, State of California defendants, PATTON L. SMITH, DAN E. SUTHER, LAURENCE J. BERRY, JOSEPH A. SIGFRID, JACK R. CHANDLER, DON F. ELLER, RICHARD ROMINGER and HANS VAN NES, hereby appeal Judge Philip C. Wilkins' decision of August 23, 1983, denying these defendants' Motion for Summary Judgment, which was brought, in part on the grounds, that these defendants are entitled to qualified immunity for their conduct.

DATED: September 15, 1983

KAHN, SOARES & CONWAY

By /s/ LEONARD HERR
Leonard Herr

Appendix C

United States Court of Appeals
For the Ninth Circuit

No. 83-2409

DC# Cv-S-79-673-PCW
Eastern California

George and Hendrika Neary,
Plaintiffs-Appellees,

vs.

Patton L. Smith, Dan E. Suther, Laurence J. Berry,
Joseph A. Sigfrid, et al.,
Defendants-Appellants.

Order

[Filed Jan. 6, 1984]

Before: Choy, Hug and Ferguson, Circuit Judges

Appellees' motion to dismiss the appeal for lack of jurisdiction is granted.

Appendix D

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In the United States District Court
Eastern District of California

No. CV F 84-55 EDP

George and Hendrika Neary,
Plaintiffs/Appellee,

vs.

Patton L. Smith, et al.
Defendants/Appellants.

[Filed July 16, 1985]

NOTICE OF APPEAL

Defendants and Appellants, Patton L. Smith, Laurence J. Berry, Jack R. Chandler, Joseph A. Sigfrid, Don F. Eller, Dan E. Suther, Richard Rominger and Hans Van Nes, (hereinafter "Appellants") under the auspices of the United States Supreme Court's decision in *Mitchell v. Forsyth* ____ U.S. ____([June 19, 1985: No. 84-335] [85 D.A.R. 3156]), which ruled the denial of a defendant's motion for summary judgment on the ground of qualified immunity is appealable, hereby appeal to the 9th Circuit Court of Appeals, Judge Wilkins' Order of August 23, 1983, denying Appellants' Motion for Summary Judgment on the issue of good faith or qualified immunity.

DATED: July 16, 1985

KAHN, SOARES & COMPANY

BY: /s/ LEONARD HERR,
Leonard Herr,
Attorney for Defendants
and Appellants

Appendix E

United States Court of Appeals
For The Ninth Circuit

No. 85-2313

DC# CV-C-F-84-55-EDP
Eastern California (Fresno)

George and Hendrika Neary,
Plaintiffs-Appellees,

vs.

Patton L. Smith, et al.,
Defendants-Appellants.

[Filed Feb. 12, 1986]
Order

Before: Choy, Hug, and Ferguson, Circuit Judges

Appellees' motion for leave to file a reply to appellants' opposition to the motion to dismiss is granted. Appellants' request for leave to file a further response is denied.

Because the notice of appeal was untimely, *see* Fed. R. App. P. 4(a)(1), we construe it as a motion to reinstate No. 83-2409, a timely appeal from the district court's order of August 23, 1983. Construed as such, the motion is denied. The appeal does not turn upon an issue of law. *See Mitchell v. Forsyth,* 105 S. Ct. 2806, 2817 (1985).

This appeal is dismissed for lack of jurisdiction.

Appendix F

United States Court of Appeals
For The Ninth Circuit

No. 85-2313

DC# CV-F-84-55 EDP
Eastern California

George and Hendrika Neary,
Plaintiffs-Appellees,

vs.

Patton L. Smith, et al.,
Defendants-Appellants.

Order

[Filed June 23, 1986]

Before: Choy, Hug and Ferguson, Circuit Judges

Appellants' petition for rehearing is denied.

No. 86-217

Supreme Court, U.S.
FILED
SEP 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

IN RE THE MATTER OF
PATTON L. SMITH, LAURENCE J. BERRY, JACK R. CHANDLER, JOSEPH A. SIGFRID, DON F. ELLER, DAN E. SUTHER, RICHARD ROMINGER AND HANS VAN NES,
Petitioners.

Ninth Cir. No. 85-2313
D.C. No. CVF 84 55 EDP
(E.D. Cal.)

OPPOSITION OF REAL PARTIES IN INTEREST TO PETITION OF WRIT OF MANDAMUS

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No. 86-217

In the Supreme Court

OF THE

United States

IN RE THE MATTER OF
PATTON L. SMITH, LAURENCE J. BERRY,
JACK R. CHANDLER, JOSEPH A. SIGFRID,
DON F. ELLER, DAN E. SUTHER,
RICHARD ROMINGER AND HANS VAN NES,
Petitioners.

Ninth Cir. No. 85-2313
D.C. No. CVF 84 55 EDP
(E.D. Cal.)

OPPOSITION OF REAL PARTIES IN INTEREST TO PETITION OF WRIT OF MANDAMUS

The Petition for Writ of Mandamus should be summarily denied. Petitioners have failed to state accurately the issue presented to the Court of Appeals and to present the actual materials to the Supreme Court that are necessary for the Court's decision on whether to grant a hearing on this issue. The record demonstrates that there is no detriment to Petitioners that a grant of mandamus would avoid, that the ruling of the Ninth Circuit was not clearly erroneous, and that Petitioners argue to this court issues never raised before the trial court. Moreover, there is no showing that the case involves an oft-repeated error or an important issue justifying intervention by this Court. As Petitioners acknowledged, in these circumstances issuance of the writ is not justified.

A. Petitioners Must Stand Trial Regardless of the Result of Their Appeal; Therefore *Mitchell v. Forsyth* Is Inapplicable and Petitioners Will Suffer No Detriment from Denial of the Writ

Real Parties in Interest, George and Hendrika Neary, individually, George Neary as representative for Neary & Neary Partnership, and Neary & Neary Partnership, aka Neary Enterprises and Neary Ranches, a Partnership, have now waited years to have a case ready for trial go to trial while the Defendants use an array of procedural devices to delay trial. Ironically, nothing Petitioners do, including this Petition for Writ of Mandamus, will prevent any of them from going to trial. This *fact,* although wholly ignored in the Petition, was presented to the Court of Appeals. The reason is simply that, even in the event that the Writ were granted and Petitioners were successful on their appeal (an event, as discussed below, the likelihood of which is subatomic), each and every one of them would face trial on state law issues concerning the very conduct which forms the basis of the civil rights actions.[1]

---

[1] Petitioners argued to the Court of Appeals that they are immune under various immunity provisions of the California Tort Claims Act, and therefore can avoid trial. Petitioners failed to inform the Court of Appeals that they had filed two major motions for summary judgment where they raised none of the immunity defenses they suggest apply. On March 9, 1984, the District Court ordered that "all further dispositive pre-trial motions . . . will be heard on Monday, July 30, 1984 . . . ," but again, Petitioners failed to raise any of these state law immunity claims. In September, 1984, the Petitioners filed a pretrial statement discussing the immunity defenses but without mentioning an intent to file a pretrial motion on the issue, as required by Local Rule 281(b)(13) of the Eastern District of California. And on July 11, 1985, the District Court judge was prepared to set a trial, at which time Petitioners announced they intended to file the notice of appeal that began the instant proceedings but said nothing about intending to file motions to dismiss or for summary judgment on the state immunity grounds. All these events occurred in the trial court approximately six years after the complaint was filed, and in that entire period Petitioners never once raised these immunity defenses for resolution by the court. To suggest that they should now have the opportunity to do so reveals the basic motivation of the defense of this action: delay.

In *Mitchell v. Forsyth*, ____ U.S. ____, 105 S.Ct. 2806 (1985), the only causes of action brought against the appealing defendants were civil rights claims that could be resolved by a successful assertion of the defense of qualified immunity. 105 S.Ct. at 2810. In such a case, where a favorable ruling will vindicate a Defendant's right not to stand trial, the standards of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), are met and immediate appealability is appropriate. 105 S.Ct. at 2815-16. This Court reasoned that the right of the qualifiedly immune to avoid trial was a "clai[m] of right separable from, and collateral to, rights asserted in the action" under *Cohen*. Unless appeal was permitted that qualified right would be lost. *Id.* at 2816.

But if as here the defendant will not avoid trial, then the criteria in *Cohen* are not satisfied and the basis for creating the *Mitchell v. Forsyth* exception is absent. The claim of the qualified right not to stand trial is not separable from or collateral to an action in which trial on other claims is inevitable, and the "right" itself is illusory in these circumstances. Indeed, where a state has specifically set forth the circumstances in which its employees can be made defendants and will face trial for their conduct, the fundamental premise of *Mitchell*, the official's immunity from suit, *id.*, has been dislocated by the state's determination to permit trial concerning such conduct. No policy is served by permitting interlocutory appeals in these circumstances, while the noncompensible cost to Plaintiffs of permitting such appeals will often be substantial, and in this case has been enormous.

Accordingly, in this case the District Court's denial of a claim of qualified immunity is not an appealable final decision within the meaning of 28 U.S.C. § 1291; *Mitchell v. Forsyth* does not apply. Moreover, for the same reasons, there has been no showing that the issuance of a Writ of Mandamus would avoid any detriment, because the detriment claimed is "subjecting petitioners to trial without first obtaining appellate review of the denial of 'qualified immunity' ". Petition ¶ 13.

B. Petitioners Have Failed to State Accurately Facts Necessary for This Court's "Ready and Adequate Understanding of the Points Requiring Consideration"

The Petition should also be denied because petitioners have misled the Court as to the issues presented below. Petitioners do not mention that their trial is inevitable, and therefore simply ignore part of the record presented to the Court of Appeal in an attempt to color this Court's perception of the Ninth Circuit Court of Appeals' decision. The petition also misrepresents the basis of the Court of Appeals' decision.[2] This is contrary to the rules of this Court, in particular Rule 21.5. As discussed further below, the petition also fails to present the full story in many other particulars in connection with the substantive issues raised.

C. Petitioners' "Legal Issues" Are Not Appealable Under *Mitchell v. Forsyth*—the Decision Below Was Not "Clearly Erroneous"

Plaintiffs' federal claims against Petitioners allege violations of substantive and procedural due process under the Fourteenth Amendment arising out of the Petitioners' decisions to issue a "hold order" (in effect, a quarantine) on Plaintiffs' cattle, to maintain that hold order for seven months beyond all need, and to require treatment of Plaintiffs' cattle with a dangerous chemical in order to treat a condition that the cattle did not have. Plaintiffs also assert violations of substantive due process and of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") in the manner that Petitioners conducted the treatment of Plaintiffs' cattle with that chemical. Each of these acts is also the basis of state law claims which are not here at issue, except as noted above.

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[2] Petitioners state that "the motions panel of the Circuit Court has ruled, without ever having the issue briefed and argued, that Petitioners' appeal does not turn on an issue of law." Petition ¶ 15. In fact, the arguments raised in the Petition and the responses of Plaintiffs in this Opposition were presented to the Court of Appeal on the Motion for Rehearing, and after consideration of those pleadings the Motion for Rehearing was denied by a three-judge panel.

Petitioners attempt to characterize four issues as appealable under *Mitchell v. Forsyth*. In each case, Petitioners distort the issue under *Mitchell v. Forsyth* and other applicable law.

1. Petitioners Do Not Dispute That Their Conduct Violated Clearly Established Provisions of FIFRA

Petitioners claim that the appealable issue concerning their violations of FIFRA is whether it was clearly established at the time of the violations that 42 U.S.C. § 1983 provided a remedy for federal statutory violations. There is no question that Petitioners' conduct—for example, the application of a registered pesticide in a manner contrary to its labelling, 12 U.S.C. § 136j(a)(2)(G)—was clearly proscribed by FIFRA at the time of the treatment operation. Petitioners argue that it was not clearly established at that time that such a clear cut violation of the law could be remedied in an action brought under Section 1983.

The issue under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), however, is not whether it was clearly established that Plaintiffs could enforce the law against petitioners, but whether "the law was clearly established . . . since a reasonably competent public official should know the law governing his conduct." *Id.* at 818-19. Moreover, this Court made it clear in *Davis v. Scherer*, ___ U.S. ___, 104 S.Ct. 3012 (1984), that the issue for qualified immunity purposes is whether a clearly established federal statute or right that is the basis for the claim of damages was violated. *Id.* at 3020 n.12. The Court, speaking relatively soon after the landmark case of *Maine v. Thiboutot*, 448 U.S. 1 (1980), did not state that *Harlow* required it be clearly established that the statute or right was enforceable through Section 1983.[3]

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[3] Indeed, in *Maine v. Thiboutot* itself, the plaintiffs obtained the payment of retroactive benefits and the Supreme Court discussed the availability of *damages* actions for violations of federal statutory rights without any mention that it would be improper to issue a judgment for damages against state officials for conduct occurring before it was clearly established that Section 1983 provided a means to remedy federal statutory violations. *See* 448 U.S. at 4-6.

2. Petitioners Failed to Raise in the District Court Their Arguments for Qualified Immunity to the Constitutional Claims

Petitioners' characterization of the appealable legal issues arising out of their assertion of qualified immunity is twisted in an attempt to fabricate a "legal" issue. Significantly, *none* of the arguments they now make for qualified immunity to Plaintiffs' constitutional claims were presented to the District Court.[4] Petitioner's failure to raise these arguments below not only demonstrates the insubstantiality to their claims, it also undercuts any claim that the Court of Appeals' decision was "clearly erroneous."

3. The District Court's Denial of Summary Judgment on the Procedural Due Process Claims Was Based on Disputed Material Facts—the Applicable Law Was Clearly Established

Petitioners' statement of the issue of law arising from their qualified immunity defense to Plaintiffs' procedural due process claims is "whether it was clearly established at the time of the conduct that the post-deprivation remedies available to Petition-

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[4] Petitioners made no argument at all that Fourth Amendment standards were not clearly established in the papers submitted to the District Court on the Motion for Summary Judgment. Their discussion of the substantive and procedural due process claims demonstrated that they did not argue the law was not clearly established, only that the facts did not support a finding of such a violation:

> The *only* manner in which the decisions to issue and maintain a hold order and the decision to treat could be considered as violative of plaintiffs' "clearly established constitutional rights" is if such decisions were arbitrary and unreasonable, and were made without providing plaintiffs an opportunity for " . . . some kind of hearing . . . at some time before state *finally* deprives a person of his property interest." (*Parratt v. Taylor,* 451 U.S. 527, 540 (1981).) In this regard the undisputed facts in this case and the applicable law establish the contrary.
>
> State Defendants' Reply Memorandum of Law in Support of Motion For Partial Summary Judgment, filed on or about November 8, 1982, at 80-81.

ers (sic) were inadequate." Petition ¶ 27. This argument is based on Petitioners' misreading of *Parratt v. Taylor,* 451 U.S. 527 (1981). Petitioners' statement of the issues simply ignores the precedent factual question of whether it was *impractical* to provide a predeprivation hearing, which was the basis of the trial court's decision. *See id.* at 539-41; Petition Appendix A—8-9.

Moreover, Petitioners' claim of qualified immunity depends on additional factual issues concerning whether Petitioners acted in conformity with established state procedure, making *Parratt* inapplicable. Contrary to Petitioners' footnoted and illogical argument, Petition at 11 n.4, it is clear that violation of procedural due process which result from established state practice can give rise to liability. *See, e.g., Haygood v. Younger,* 769 F.2d 1350, 1358 (9th Cir. 1985) (en banc), *cert. pet. pending sub nom. Crake v. Haygood,* 54 U.S.L.W. 3393 (Dec. 10, 1985). There also remains a factual issue as to whether any or all of the Petitioners were such "highly placed responsible supervisory officials" that their acts by definition are not "random and unauthorized" under *Parratt. See Berlanti v. Bodman,* 780 F.2d 296, 300-301 (3d Cir. 1985).

Even if Petitioners' characterization of applicable Supreme Court authority were correct, their presentation of the issue again relies on a distortion of the standards under *Harlow v. Fitzgerald,* which cannot be read to require that in order to defeat a claim of qualified immunity Plaintiffs demonstrate that it was clearly established at the time of the conduct in question that postdeprivation remedies available to those particular Plaintiffs be inadequate.

4. Petitioners Attempt to Fabricate a "Legal Issue" on the Substantive Due Process Claims—They do Not Argue that the District Court Did Not Apply Clearly Established Law

Petitioners' statement of the issue arising from the substantive due process claims demonstrates that the disputed issue—whether Petitioners' conduct was arbitrary and outrageous—is one of fact. Petitioners do not dispute that the standard

applied by the District Court, requiring arbitrary, unreasonable and outrageous conduct, was appropriate and clearly established.[5]

Petitioners argue that the issue of law is whether admittedly outrageous and shocking conduct by government officials which violates substantive due process is entitled to qualified immunity if the law was not clearly established at the time that the particular conduct in question could ever give rise to a substantive due process claim. In other words, Petitioners argue that outrageous and shocking conduct by government officials is always immune unless as a matter of law somehow it be clearly established at the time of the conduct that such particular conduct violates substantive due process standards. While this may be a "legal" issue, it is not the kind of legal issue arising from qualified immunity claims that is appealable under *Harlow v. Fitzgerald, supra.*

5. Petitioners Mischaracterize the Appealable Legal Issue on Fourth Amendment claims

Finally, Petitioners argue that the appealable legal issue on the Fourth Amendment claims is whether it was clearly established that an unreasonably imposed quarantine of Plaintiffs' cattle, imposed without a hearing and without probable cause, could

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[5] Petitioners once again misrepresent the record where they state that "the District Court held that no substantive due process violation occurred from the conduct of the treatment" because a violation was not sufficiently shown. *See* Petition ¶ 28. In fact, the District Court's holding that Petitioners' conduct of the treatment operation did not violate substantive due process resulted from the unsettled state of the law in the Ninth Circuit at that time concerning whether *Parratt v. Taylor* applied to substantive due process claims. Petition Appendix A-11-12. Since that time, the Ninth Circuit has held that *Parratt v. Taylor* does not apply to claims of violations of substantive due process. *Rutherford v. City of Berkeley,* 780 F.2d 1444, 1447-48 (9th Cir. 1986); *Mann v. City of Tucson,* 782 F.2d 790, 793 (9th Cir. 1986). Although this issue will not arise before this Court as a result of this Petition, it is important to note that the District Court applied the proper constitutional standard to determine whether Plaintiffs' substantive due process rights were violated, and determined there was a factual issue as to whether such a violation occurred.

violate clearly established proscriptions of the Fourth and Fourteenth Amendments.[6] In other words, they argue that it was not clearly established that the Fourth Amendment applied at all to the unreasonable seizure of Plaintiffs' cattle. Once again, Petitioners do not challenge the District Court's holding of what the applicable Fourth Amendment standard is, nor do they argue that that standard was not clearly established at the time of their conduct.

In sum, Petitioners are unable to state any legal issues that would form a proper foundation for an appeal. The issues they raise are dependent on precedent factual issues, and/or are dependent upon a misreading of the applicable law, and/or are arguments not presented to the District Court at all and are mere constructs designed to further delay the inevitable trial in this action. The Court of Appeals correctly determined that the issues Petitioners wish to raise are not appealable under *Harlow v. Fitzgerald* and *Mitchell v. Forsyth*.

D. Issuance of a Writ of Mandamus Is Not Justified, and There Is No Reason for the Supreme Court to Assume Jurisdiction

This is not a case deserving of the attention of the Supreme Court. There are no important issues raised in this Petition. Nor is there any oft-repeated error. This case presents unusual facts. The appeal is from a denial of summary judgment made two years before the Notice of Appeal was filed. Because of this, the Court of Appeals had to treat the Notice of Appeal as a motion for reinstatement of that appeal. The Court of Appeals' discretion in treatment of such a motion has been ignored by Petitioners. Petitioners cannot demonstrate that the order dismissing the

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[6] Petitioners argued this point differently before the Court of Appeals, where they characterized the legal issue as whether their conduct "was so lacking in probable cause as to constitute a violation of clearly established rights to be free from unreasonable seizures." Petition for Rehearing at 4:23-25. This statement indicates they challenge the factual underpinings of the District Court's ruling on the substantive issue, not the Court's decision on qualified immunity.

appeal was clearly erroneous as a matter of law in these circumstances.

For like reasons, this is not an appropriate case for the issuance of a Writ of Mandamus. As discussed above, the right to issuance of the Writ is not clear and indisputable. There is no damage or prejudice to be suffered from denying the application. The District Court's Order is neither clearly erroneous, nor an oft-repeated error, nor does it raise new and important problems. Further, the Petition misrepresents the issues before the Court, misrepresents the issues presented to the Court of Appeals, and misrepresents the basis of the Court of Appeals' decision.

CONCLUSION

The Petition should be denied. This is not an appropriate case for the issuance of a Writ of Mandate because no detriment will be suffered by Defendants if the Writ is denied, because the ruling below is not clearly erroneous, because there is no oft-repeated error involved in this case, because this case does not involve any important issue, because the Petitión has not accurately, clearly or fairly presented the facts and issues relevant to the decision of the Court of Appeals, and because even if this Court were to consider the merits of the Court of Appeals' decision it would find that decision both correct and just.

Ultimately, no matter whether this Court grants the Petition and the Petitioners' position ultimately be sustained, the essential consequence of all of Petitioners' maneuvering has been to delay the inevitable: a trial on the merits concerning Petitioners' outrageous and damaging conduct. It is now seven years since the Complaint was filed. Petitioners have made no showing of the appropriateness of using the extraordinary remedy of requesting a Writ of Mandamus from the Unted States Supreme Court to further their purpose of delay.

DATED: August 29, 1986

Respectfully submitted,

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